Turkish Competition Authority

REKABET KURUMU

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### External Relations, Training and Competition Advocacy Department

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# INTRODUCTION

Turkish Competition Authority
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We are proud to present to you the Competition Bulletin for the third three months of 2017, which includes news on developments in competition law, industrial organization and competition policy.

In the "Selected Reasoned Decisions" section of this issue, we included 2 investigations, 1 acquisition aplication and 2 exemption assesments which were conducted under the related articles of the Act No. 4054 on the Protection of Competition.

The "News around the World" section of the Competition Bulletin includes news from EU, OECD and World Bank, Germany and Italy.

"Selected Decisions under Administrative Law" section contains Council of State and Administrative Court of Ankara rulings concerning some decisions of the Competition Board.

The last section, "Economic Studies", includes a summary of an aricle published in the Journal of Competition Law & Economics titled "Can One (Ever) Accurately Define Markets?" and another article published in the Journal of Industry, Competition and Trade titled "Industrial Policy to Develop a Multi-Firm Industry".

Last of all, we would like to remind you that you can always forward your opinions and recommendations on the Competition Bulletin to us, through bulten@rekabet.gov.tr

With our best regards.

Department of External Relations, Training and Competition Advocacy

- **Investigation on Boru Hatları ile Petrol Taşıma A.Ş.**

| Decision Date: | Decision No: | Type: |
|---|---|---|
| **27.04.2017** | **17-14/207-85** | **Investigation** |

The relevant decision was taken as a result of the investigation launched in response to the Council of State's annulment decision concerning the determination of whether Boru Hatları ile Petrol Taşıma A.Ş. (BOTAŞ) violated article 6 of the Act no 4054 by hindering the operations of and discriminating against Bis Enerji Elektrik Üretim A.Ş. (BİS ENERJİ), a company active in the field of electricity generation and sales, via unfairly cutting off the natural gas supply the latter required for electricity generation.

There is no direct purchase and sale relationship between the complainant BİS ENERJİ and BOTAŞ. BİS ENERJİ purchases natural gas from the Bursa Organized Industrial Zone (BOIZ) Directorate within the framework of article 20 of the Organized Industrial Zones Law, no 4562. The Natural Gas Sale Agreement (NGSA) signed between the BOIZ Directorate and BOTAŞ on 14.06.2002 falls under the "Interruptible/Uninterruptible" category. It has been found that with the arrangements of articles 2 and 3 of the NGSA, the parties agreed that BİS ENERJİ would use natural gas from the interruptible category, and that article 15 of the NGSA, titled "Interruption of the Gas Supply," provided that BOTAŞ could interrupt the supply of "natural gas for electricity generation" to BOIZ when required, preferably giving notice beforehand when possible.

In February 2004, which is the period under dispute, BOTAŞ took certain measures to ensure the safe operation of the transmission system, which is a duty placed on BOTAŞ by the Act no 4646. It was found that natural gas supply to BİS ENERJİ was interrupted due to an unanticipated interruption in İran natural gas and a failure in a compressor station in February 2004. Before the natural gas supply was interrupted, emergency measures were taken to ensure that the interruption would last for the shortest time possible, and natural gas was provided again on 17.02.2004 once more. Therefore, BOTAŞ cut off the natural gas supply of BİS ENERJİ due to technical reasons in order to effectively and efficiently carry out the duties specified by the Act no 4646, and immediately terminated the interruption as soon as the supply deficit and planning uncertainties were eliminated. Within this framework, BOTAŞ's interruption meets valid grounds condition both in terms of objective necessity (tangible problems at gas inlet points and compressors) and legitimate interest (the security of national supply is

a good example of legitimate interest). Therefore, it was found that the conduct under investigation did not violate article 6 of the Act no 4054 in this respect.

Concerning the claim that natural gas was not cut off for Hitit Seramik San. ve Tic. A.Ş. (HİTİT SERAMİK) and Unpaş Seramik San. ve Tic. A.Ş (UNPAŞ SERAMİK), both of which are on the same pipeline, and that this showed BOTAŞ abused its dominant position through its discriminatory practices, it was established that BİS ENERJİ was not in a similar position with HİTİT SERAMİK and UNPAŞ SERAMİK This is because according to the NGSA BOTAŞ signed with BOİZ, BİS ENERJİ was in the "interruptible" category while HİTİTSERAMİK and UNPAŞ SERAMİK were in the "uninterruptible" category. In addition, just like BİS ENERJİ, BOTAŞ also cut off natural gas supply to the Ak Enerji Elektrik Üretim A.Ş., which owns an electricity generation plant and which is situated in the Uşak OIZ. Secondly, according to the interruption/restriction procedures, natural gas supply to private sector plants are subject to secondary interruption, with the public plants suffering priority interruptions on limited capacity days. Consequently, BİS ENERJİ was not put in a disadvantageous position before any of its rivals in the electricity generation and wholesale market, neither with respect to the power plants in the same region nor in terms of the public-private plants distinction. Within this context, it was concluded that the BOTAŞ's interruption of the natural gas supply during the period under investigation was not solely aimed at BİS ENERJİ and did not violate article 6 of the Act no 4054.

With the BOTAŞ Board decision dated 30.01.2004 and numbered 2004/03-46, BOIZ as well as other OIZ Directorates were transferred from the "interruptible" category to the "uninterruptible" category. In light of the date and content of the Board decision in question, it becomes clear that BOTAŞ's transferring BOIZ, and with it, BİS ENERGY to the uninterruptible category from the interruptible category was not a pre-planned action aimed solely at BİS ENERJİ; instead it was a decision covering all OIZs, taken by the BOTAŞ Board in consideration of the results of a simulation study. Energy Markets Regulatory Authority decision dated 27.01.2004 and numbered 291, taken within the framework of the Provisional Article 2 of the Natural Gas Market Tariffs Regulation, sets the calculation principles for BOTAŞ's wholesale prices. These principles are applicable to "uninterruptible" tariffs, with "interruptible" customers receiving a 3% discount over the uninterruptible prices. Consequently, the tariffs set by the regulatory authority are universal, and neither BOTAŞ nor the companies providing the gas have any discretion on pricing. For this reason, it is not

possible for BOTAŞ to change the interruptible-uninterruptible portfolio for profit purposes. In light of the observations above, the purpose of the portfolio rationalization done by BOTAŞ, whose wholesale prices are under regulation, is to guarantee the security, control and reliability of the system operation with the least cost and in the easiest manner possible. Moreover, BOTAŞ also carried out a cost-benefit analysis for the restructuring of the portfolio with a simulation study in which many parameters of the security of supply were taken into consideration. In this context, it was concluded that the transfer of BİS ENERJİ and BOIZ from the interruptible to the uninterruptible category by BOTAŞ was done as a result of a cost-benefit analysis aimed at ensuring supply and demand equilibrium, that it was not aimed at BOIZ or at BİS ENERJİ in particular, and that it did not violate article 6 of the Act no 4054, as a result.

In consequence, it was decided that the gas supply interruption and the category change done by BOTAŞ were based on justified technical grounds, that they did not discriminate between buyers of equal status, and that BOTAŞ did not violate article 6 of the Act no 4054 by abusing its dominant position.

- **Investigation on Luxottica Gözlük Endüstri ve Ticaret A.Ş.**

| Decision Date: | Decision No: | Type: |
|---|---|---|
| **23.02.2017** | **17-08/99-42** | **Investigation** |

The relevant decision was taken as a result of the investigation launched on Luxottica Gözlük Endüstri ve Ticaret A.Ş. (LUXOTTİCA) in order to determine whether it violated article 6 of the Act no 4054, in response to the claim that the undertaking in question bundled certain products together, that it implemented discriminatory discount rates in its discount system, and thereby distorted competition at the retail level.

Eyeglasses used by consumers are classified in two categories, namely sunglasses and prescription optical glasses. LUXOTTİCA offers products in both groups. Despite the fact that the two types of frames can be said to have a high level of substitutability in terms of supply, due to the key differences in the intended use and methods of purchase between the two, frames for sunglasses and prescription glasses constitute separate product markets. Those glasses with wholesale prices between 5 to 10 TL, which do not meet the required health criteria and which use significantly lower quality production materials than higher-quality, fashionable products are not included in the market. In addition, since eyewear retailers, department stores and clothing retailers directly sell the products they procure in their

own retail stores, and since they do not make bulk sales to opticians and other retail glasses points of sales, they were found not to be competitors for undertakings which provide bulk products such as LUXOTTİCA. Accordingly, the relevant product markets were defined as "the bulk sales of branded sunglasses," and "the bulk sales of prescription eyeglass frames". The relevant product market is Turkey.

The investigation found that LUXOTTİCA was significantly different than its rivals due to its strong position in the market, its wide product portfolio, its vertical integration and the financial power it wields. LUXOTTICA was (....) times larger than its closest competitor. Its market share in leading chain opticians were in parallel to the market in general. Its strong portfolio, the brand power of Ray-Ban and the advertisement expenses not only strengthened the undertaking's dominant position, but it also served as a barrier to entry. Neither LUXOTTICA's nor its rivals' market shares showed any changes through the years. With the exception of a few optician chains, chains in general were far from constituting any type of countervailing buyer power, despite growing larger in the market. Moreover, even if they could get advantageous conditions individually, this would not be reflected on the scattered market. Within this framework, it was concluded that LUXOTTİCA held dominant position in the market for the bulk sales of branded sunglasses.

The discount system mentioned in the claims was assessed separately in the categories of "refusal to supply," "price discrimination" and "creation of effective exclusivity" which are listed among examples of abuse.

The assessment into refusal to supply allegations found that a significant portion of opticians continued their operations without selling LUXOTTİCA products, which showed that, while important in terms of being able to operate in the market, LUXOTTİCA products were not essential facilities. There are other undertakings in the market offering alternative products which may compete with LUXOTTİCA's products. The fact that LUXOTTİCA products have equivalent products in the market also supports the observation that they lack the nature of essential facilities. It was also established, within the scope of the present case, that the relationship between the parties was a resale relationship, instead of one in which the provider supplies access to an input/infrastructure required to operate in the downstream market. Within that context, it was concluded that even though LUXOTTİCA products were critical for opticians to maintain their operations, they did not constitute an essential facility as required for refusal to supply consideration under competition law. Therefore, it was

found that the examined practices of LUXOTTİCA could not be assessed as abuses of dominant position through refusal to supply.

The assessment into price discrimination stated that the discount rates implemented in LUXOTTİCA's system did not involve setting discount rates according to whether customers worked with its competitors. On the other hand, the varying discounts implemented for the four customers examined under the file showed that the discounts were based on the purchase amounts and the corresponding buyer power of the undertakings concerned. Within this framework, it was concluded that the system utilized in these four customers could not be considered as "applying different conditions for equivalent transactions." In addition, neither does the practice fulfill the condition of distorting competition downstream, which is a prerequisite for finding a violation. As a result, it was concluded that the practice could not be evaluated as an abuse of dominant position through price discrimination.

Regarding the full-line forcing practice, it was stated that this would require an assessment to see whether the undertaking restricted competition in the market, and thus the access of final consumers to alternative products, by foreclosing the sales channels to its rivals, similar to exclusivity practices. Therefore, it was noted that the relevant analysis exactly corresponded with the evaluation of the discount system, and the market effects of these two aspects of the practice were addressed together.

The discount system implemented by LUXOTTİCA was also assessed with regards to effective exclusivity violations. On-the-spot inspections conducted could not uncover any documents clearly indicating that LUXOTTİCA aimed to establish exclusivity or to foreclose its competitors, but various e-mails were found urging a strict application of the discount system. LUXOTTİCA's target-turnover based discount system is intended to improve loyalty by its retroactive, personalized characteristics with increasing rates. Therefore, the target-turnover based discount system implemented by LUXOTTİCA must be assessed in terms of its impact of creating effective exclusivity. According to the analyses conducted under the present file, it was found that LUXOTTİCA's full-line forcing discount system practices could affect a significant portion of the market, had exclusionary effects on competitors and opticians since it caused foreclosure far beyond LUXOTTİCA's market share in customer purchases, and consequently it was in violation of article 6 of the Act no 4054. It was determined that those practices of LUXOTTİCA violating article 6 of the Act were conducted between 2013 and 2015.

Therefore it was decided that in accordance with the provisions in paragraphs three of article 16 of the Act no 4054 as well as with articles 5.1(b), 5.2, 5.3(a) of the "Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position," an administrative fine of TL 1,672,647.11 should be imposed on LUXOTTİCA, at 0.75% of its annual gross revenues generated by the end of the financial year of 2015, as determined by the Board.

- **The Acquisition of Tesco Kipa by Migros Ticaret A.Ş.**

| Decision Date: | Decision No: | Type: |
|---|---|---|
| **09.02.2017** | **17-06/56-22** | **Acquisition** |

The relevant decision was taken as a result of the preliminary inquiry conducted into the acquisition, by Migros Ticaret A.Ş. (MİGROS), of 95,495% of the shares of Tesco Kipa Kitle Pazarlama Ticaret Lojistik ve Gıda San. A.Ş.'nin (TESCO KİPA), controlled by Tesco Overseas Investments Limited.

The vertical markets expected to see an impact within the scope of the acquisition are "off-premises beer," "cola drink," "orange (flavored) soft drink," "plain soft drink," "packaged water," "fruit juice, fruit nectar and fruit drinks," "ice tea," "sports drinks," "energy drinks," "stationery materials," "raw vegetables and fruits," and "wholesale retail" markets. The transaction has horizontal effects on the fast moving consumer goods (FMCG) organized retail and department store operation markets, where the operations of MİGROS and TESCO KİPA overlap. These markets are defined as the relevant product markets.

Since customer attraction areas of stores are important in terms of FMCG retailing activities, the relevant geographical markets were determined on the basis of districts. Within this framework, the relevant geographical market for the FMCG organized retail market was defined as the following 76 districts where MİGROS and TESCO KİPA have overlapping operations: Ankara-Çankaya, Ankara-Keçiören, Ankara-Polatlı, Ankara-Yenimahalle, Antalya-Alanya, Antalya-Kaş, AntalyaKepez, Antalya-Konyaaltı, Antalya-Muratpaşa, Aydın-Didim, Aydın-Efeler, AydınKuşadası, Aydın-Söke, Balıkesir-Ayvalık, Balıkesir-Bandırma, Balıkesir-Burhaniye, Balıkesir-Edremit, Balıkesir-Karesi, Bursa-Mustafakemalpaşa, Bursa-Nilüfer, Bursa-Osmangazi, Çanakkale-Merkez, Denizli-Merkezefendi, Edirne-Keşan, Edirne-Merkez, Edirne-Uzunköprü, İstanbul-Ataşehir, İstanbul-Bakırköy, İstanbul-Büyükçekmece, İstanbul-Esenyurt, İstanbul-Küçükçekmece,

İstanbul-Pendik, İstanbul-Sancaktepe, İstanbul-Silivri, İzmir-Balçova, İzmir-Bayraklı, İzmir-Bornova, İzmir-Buca, İzmir-Çeşme, İzmir -Çiğli, İzmir -Dikili, İzmir-Gaziemir, İzmir-Güzelbahçe, İzmir-Karabağlar, İzmir-Karaburun, İzmir-Karşıyaka, İzmir-Konak, İzmir-Menemen, İzmir-Narlıdere, İzmirÖdemiş, İzmir-Torbalı, İzmir-Urla, Kırklareli-Babaeski, Kırklareli-Lüleburgaz, KırklareliMerkez, Kocaeli-Derince, Kütahya-Merkez, Manisa-Salihli, Manisa-Şehzadeler, Manisa-Soma, Manisa-Yunusemre, Mersin-Tarsus, Mersin-Yenişehir, Muğla-Bodrum, Muğla-Fethiye, Muğla-Marmaris, Muğla-Menteşe, Muğla-Milas, Nevşehir-Merkez, Sakarya-Adapazarı, Tekirdağ-Çerkezköy, Tekirdağ-Çorlu, Tekirdağ-Hayrabolu, Tekirdağ-Marmara Ereğlisi, Tekirdağ-Şarköy, Yalova-Merkez

For the supply market, the relevant geographical market was defined as "Turkey".

As a result of the analysis conducted into the horizontal aspect of the acquisition, it was concluded that no competition concerns would arise in the "department store operation market" due to the transaction.

In terms of the FMCG organized retail market, a dominance analysis was conducted in those districts determined to be the relevant geographical market, which included discount stores and stores operating in the organized retail market without m2 limitations, while the market shares calculated on the basis of square meters were taken into account where the parties of the transaction had overlapping operations. An assessment was conducted for the 29 districts where the markets shares of the parties would reach significant levels at 40% and beyond following the transaction. However, the concentration index analysis of the relevant 29 districts revealed that concentration was at a minimal level only in (.....) and therefore that district could safely be ignored since this would not lead to any competitive concerns. In terms of the other districts, it was found that market shares would increase beyond the 40% level according to 2016 data and MİGROS could become dominant in these districts due to the thresholds established by HHI criteria being exceeded.

In addition, it was also found that the acquisition of TESCO KİPA by the national supermarket chain MİGROS would be a concentration of a type that would eliminate a close competitor. The assessments also took account of the fact that one of the three players in the multi format was being acquired by one of its closest rivals. It was determined that products and services offered by the undertakings in the market were substitutable, provided there was some overlap, and that these undertakings would not encounter competitive pressure for those products of MİGROS and KİPA which do not

overlap with those of discount stores. With the exclusion of customers with brand loyalty, in the absence of a concentration in the local market, it is possible to switch suppliers and procure complementary services from suppliers. In light of the fact that buyers in the relevant market are individual consumers, it does not seem possible to talk about countervailing buyer power in the markets comprising the subject matter of the file.

The analysis of entry barriers showed that there were high barriers to entries at a competitive level in the retail sector. The file included district-based assessments concerning potential market entries with a threshold of around 40%, and the decision found that the districts of (...) where the parties of the transaction would acquire high market shares posed competitive problems. Even though there was potential competition provided by discount markets in particular, it was concluded that the high market shares that would arise in the districts in question were sufficient to lead to dominant position. In addition, it was noted that no new discount markets were expected to enter the markets under consideration. In those markets which were found to be competitively problematic, potential sites must be integrated into the market in a timely manner, in a way that would fulfill the potential and sufficient criteria, in order to consider these sites entries into the organized retail market. In that sense, it seemed difficult to consider sites at the building plot and beginning of construction stages as sufficient and potential market entries. In light of the investment plans of the players in the sector, the sum of the markets shares of the parties exceed the 40% threshold in at least 9 districts, and the parties have decided to offer a remedy with divestiture and downsizing commitments.

The transaction was also assessed with respect to creation of anti-competitive coordination. First of all, it was found that the organized FMCG retailing market did not involve conditions similar to those encountered in the markets where horizontal coordination may be easily ensured and maintained. For the assessment in terms of potential vertical coordination following the transaction, MİGROS undertook certain commitments.

The assessment into the vertical aspect of the acquisition established that the transaction in question should not be authorized in the beer market. In order to eliminate vertical competitive concerns, MİGROS offered behavioral commitments similar to those presented in the decision dated 09.07.2015 and numbered 15-29/420-117. For the other markets with vertical overlap, it was determined that competitive concerns under article 7 of the Act no 4054 would not arise.

It was found that the commitments presented by MİGROS concerning the vertical effects of the notified transaction were the same as the commitment package adopted in the decision dated 09.07.2015 and numbered 15-29/420-117. The commitments offered were assessed in terms of those parts identical to and different from the commitments adopted in the relevant decision, and it was decided that the commitment package was sufficient to eliminate any concerns which may arise as to the vertical aspect of the notified transaction.

The commitment package presented by MIGROS undertakes to divest some stores in order to address horizontal concerns. Following the divestitures in question, the total market shares of the parties in terms of districts fall below 40% according to the estimated growth calculations. In addition, the content and form of the text of the commitment was assessed within the framework of the Commitment Guidelines, and it was determined that they were sufficient to eliminate competitive concerns related to the transaction.

Consequently, it was decided that the notified transaction would create a dominant position or strengthen the existing dominant position in some districts where it resulted in concentration, and thus could lead to a significant decrease in competition in the relevant market. It was also concluded that the transaction could strengthen the dominant position of Anadolu Efes Biracılık ve Malt Sanayii A.Ş., which is under the umbrella of the same economic entity with MİGROS, and thereby could lead to a significant decrease in competition. However, it was also decided that the commitments package presented by MİGROS was generally sufficient to eliminate the abovementioned concerns, and that the notified transaction should be authorized subject to the commitments package dated 25.01.2017 and numbered 580.

- **Exemption Assessment for the Card Storage Service of BKM**

| Decision Date: | Decision No: | Type: |
|---|---|---|
| **23.03.2017** | **17-11/134-61** | **Exemption** |

The relevant decision was taken as a result of the assessment of the request for individual exemption for the card storage service provided by the Bankalararası Kart Merkezi A.Ş. (Interbank Card Center - BKM) under article 5 of the Act no 4054.

The card storage service comprising the subject matter of the notification is a service provided to those undertakings which receive repeated payments to ensure that payment can be made without requiring these

undertakings to store the information for the card to be used for payment, by having another organization (BKM in the present file) store the relevant information for them.

The product market in the file was defined as the "card data storage service market". In addition, it was found that the service could have indirect impact on the "card payments market," and therefore the aforementioned market should be considered an affected market. The relevant geographical market was defined as "Turkey".

The notified card storage service is provided under the umbrella of the BKM, which was formed jointly by banks. While banks can create and develop, or otherwise independently outsource from external service providers the technologic infrastructure which represents a significant part of inter-bank competition, and thereby prepare the banking services provided to customers through this technological infrastructures, the fact that they chose to provide it under the body of BKM, which is an association of undertakings, causes some impact on competition in the above-cited services. In that sense, it was evaluated that any economic activity of the association of undertakings, namely BKM, which might affect competition between its own partners/members in the banking sector and in the secondary services supplementing banking services, which includes the service in question, would be in violation of article 4 of the Act no 4054. Therefore an individual exemption assessment must be made concerning BKM's card storage service.

The assessment, made under article 5(a) of the Act no 4054, determined that, in light of the contributions of card payments to the national and global economies, the notified storage service would lead to various economic and technical developments, such as creating cost advantages by decreasing operational requirements, eliminating security risks associated with card payments, ensuring prompt confirmation of collections, increasing success rates in collections, and preventing financial losses. As a result, it was assessed that the relevant service met the requirement of article 5(a) of the act no 4054.

The assessment of consumer benefit found that the BKM card storage service would have favorable aspects with positive effects on the consumer, such as decreasing costs and ensuring high security. Consequently, it was established that the requirement of article 5(b) of the Act no 4054 stating that the consumer must benefit from the service was also fulfilled.

Following the entry into force of the Act no 6493, undertakings other than banks began to enter the payments market in general, and BKM's entry into

the card data storage market was expected to incentivize other undertakings to invest and innovate. Therefore, it was assessed that, in the present case, the notified service also fulfilled the requirement of article 5(c) of the Act no 4054. However, some competitive concerns were also brought up, due to the fact that the relevant market was a newly forming one. Companies providing card storage services were in competition with BKM in various areas, including in relation to the markets related to banking and gaining member businesses. This could lead pose a risk of the banks promoting BKM and complicating the operations of other institutions when presenting BKM's card storage service. This was seen as another reason why the developments in the card data storage services market required supervision. In this respect, it was concluded that competitive conditions in the market should be monitored for a period of time, since the relevant market was a newly-emerging one, competitive conditions in the market could change rapidly, and negative effects on competition were likely.

The last requirement to be assessed was that of not limiting competition more than what was required. Within the framework of the notified BKM card storage service, member businesses were not put under any restrictive obligation such as non-compete, exclusivity, etc. The business was able to work with any organization offering a member business agreement. BKM did not intervene with the commercial relationship between the undertakings in question (such as contract negotiations, virtual POS usage conditions, commission negotiations, etc.) In this respect, it was evaluated that the notified service fulfilled the requirement of article 5(d) of the Act no 4054, which prohibits placing undue restrictions on competition.

As a result, it was decided that, despite its restrictive effects on competition, the card data storage service to be provided by BKM had positive aspects due to technical developments and consumers benefits it would cause, and therefore could benefit from individual exemption under article 5 of the Act no 4054. However, since the relevant market was an emerging one, the exemption in question would expire at the end of one year following the date of the decision herein.

- **LASDER Exemption Examination**

| Decision Date: | Decision No: | Type: |
|---|---|---|
| **27.04.2017** | **17-14/196-82** | **Exemption** |

The relevant decision was taken as a result of the exemption assessment concerning the request for the grant of a negative clearance or exemption to the association of undertakings decision concerning the carrying out of

the activities falling within the framework of the "Waste Management Strategies and Implementation Plan for End-of-Life Tires 2016-2020," prepared by the Tire Industry Association (LASDER).

The Regulations on the Control of End-of-Life Tires dated 25.11.2006 and numbered 26357 (EOLT Regulations) prohibits the disposal of expired tires in an environmentally-harmful manner and requires the collection and recycling of such tires. In accordance with the Regulations, based on the producer responsibility principle, tire importers and producers are obliged to collect, recycle and dispose of end-of-life tires (EOLT) at an amount determined by the EOLT Regulations.

In the EOLT management system, which is laid out in the relevant decision of the association of undertakings, competing undertakings come together to set a total invoice price called EOLT recycling contribution fee. This contribution fee is implemented at a fixed rate by the member undertakings and could increase tire prices at a small amount. In other words, this could be one of the factors contributing to the final tire prices. Similarly, the decision determined how the contribution fee in question would change in accordance with the increases or decreases in costs. LASDER retained the marketing rights of the waste collected by collectors. Within this framework, collectors do not have the right to sell the waste to any recycling or recovery company, and instead the waste is shipped to the undertakings determined by LASDER. Consequently, the aforementioned regulations of the EOLT management system fall under article 4 of the Act.

Since the collection of EOLT is an activity in which scale economies become important, the EOLT collection activities would be more efficient and less costly if done under the umbrella of the association of undertakings. The efficient collection of the EOLTs in question would allow for the better operation of this market as well as for the entry of new companies into the recycling market. As a matter of fact, following the LASDER decision dated 27.10.2010 and numbered 10-67/1422-538 taken by the Board, more EOLT has been collected each year. Within this framework, it was assessed that the requirement of article 5.1(a) of the Act no 4054 has been fulfilled by the association of undertakings decision concerned.

One of the goals of the EOLT Regulations is to "prevent [EOLTs] from being directly or indirectly supplied to the receiving environment in an environmentally-harmful way." Ensuring the efficient collection and recovery of EOLTs is a regulation aimed at decreasing the social costs which would arise in case of haphazard EOLTs disposal. Handling the EOLT collection activities through a system such as LASDER would allow a

healthier collection of EOLTs. Besides, in light of the adverse effects on the human health caused by the environmental harm of the accumulation of EOLTs in the receiving environment, the importance of collecting EOLTs in large numbers quickly may be appreciated. Therefore, it was concluded that the collection and disposal of EOLTs would minimize the aforementioned negative effects thereby benefiting both the consumers and the society, and that the a small cost corresponding to around (...)% - (...)% of the tire price would fulfill the requirement of consumer benefit as stated in article 5.1(b) of the Act no 4054 with respect to realizing the above-mentioned benefits.

The requirement of not eliminating competition in a significant portion of the relevant market was assessed in terms of whether tire producers which are not members of LASDER would face problems in fulfilling their obligations in the EOLT collection market in which LASDER operates. Non-member undertakings fulfill their obligations through authorized wholesalers. Those tire producers which are not members to LASDER are not in any way prevented from founding other systems by collaborating in partnerships of two, three etc. companies. This possibility is supported by the transparency in relation to joining LASDER and resignation of membership. Within this context, following the Board decision dated 27.10.2010 and numbered 10-67/1422-538, the presence of other recycling/recovery companies in the relevant market are a positive factor. It was found that some of the listed undertakings were also operating in the waste collection market. LASDER has stated that it provides services to all suppliers for a fee, and that it previously provided services to some undertakings which were not LASDER members. Contracts signed between LASDER and collection firms do not include any exclusivity provisions benefiting LASDER. Therefore collectors are allowed to do business with other undertakings. Besides, a collector assigned to a particular region as a result of a tender may also offer bids for other regions and, if it wins the tender, may operate in these regions as well. In light of these considerations, it was evaluated that there were no significant restrictions on competition in the market due to the decision of the association of undertakings.

In the assessment into undue restrictions on competition, the restrictions on the marketing rights of collectors are important. In the current file, if the characteristics of the LASDER system, the fact that Turkey is in the beginning stages of the formation of waste markets, and the fact that marketing waste is very difficult are all taken into consideration, it must be concluded that the restrictions on the waste marketing rights were not more

than what is necessary. A separate assessment was conducted in relation to the fact that other recycling firms could only start/maintain their operations if they could sign contracts with the waste management systems. It was found that LASDER did not prevent new entries into the market. In fact, the significant role played by LASDER in the marketing activities through its size and awareness work was seen as a positive factor for collection companies. It was determined that LASDER's selling the amount of waste in its possession to recovery companies via tenders would better serve the establishment of a competitive market structure. However, the firms in question are not required to exclusively procure EOLT from LASDER. Therefore, it was assessed that the requirement of article 5.1(d) of the Act no 4054 prohibiting undue restrictions on competition was fulfilled in terms of the decision of associations of undertakings in the applications, since recovery firms could purchase raw materials from the market in competitive conditions, with significant impact on the development of the market.

As a result, the association of undertakings decision concerning the carrying out of the activities falling within the framework of the "Waste Management Strategies and Implementation Plan for End-of-Life Tires 2016-2020," prepared by the Tire Industry Association (LASDER) was granted individual exemption for a period of 5 years as of the date it was put into effect, since it fulfilled all of the conditions listed in article 5 of the Act no 4054.

- **European Court of Justice sent Intel decision back for review**

Europe's top court, European Court of Justice (ECJ) referred back the Intel decision to the General Court in order for it to examine the arguments put forward by Intel concerning the capacity of the rebates at issue to restrict competition. That is General Court has to consider whether the Commission had correctly applied the as-efficient-competitor test to the dominant company's loyalty rebates.

The Commission penalised Intel in 2009 with a 1,06 billion Euros record fine for abusing its dominance in the market for x86 central processing unit computer chips, in which the company was found to have at least 70% market share. According to Commission, Intel between 2002 and 2007 by giving computer makers such as Dell, Hewlett-Packard, NEC and Lenovo rebates and payments, based on their buying practically all of their chips from Intel and limiting the market availability of products with rivals' chips abused its dominant position.

General Court had rejected Intel's appeal in 2014 and upheld that its rebate scheme was inherently anticompetitive and that there was no need to consider the circumstances of the case, which led the company to take the matter to the ECJ.

It is argued that ECJ's decision clarifies its position as favoring a more effects-based approach to rebate schemes operated by dominant companies and means the years-long battle over Intel's fine may drag on, but will also embolden the likes of Google and Apple, which have faced their own battles with the Commission.

**Sources:**

https://techcrunch.com/2017/09/06/intel-antitrust-decision-sent-for-review-by-europes-top-court/

https://www.lexology.com/library/detail.aspx?g=34edfd7c-9953-4b3a-b07b-257ee0a0f732

http://globalcompetitionreview.com/article/1147141/ecj-general-court-must-consider-intel-arguments-for-rebates

- **EU Commission takes proposed acquisition of Monsanto by Bayer in Phase II**

DG Comp launched a Phase II investigation into Bayer's 56 billion Euro acqusition of agrochemical business Monsanto on 22 August 2017. According to proposed deal, Bayer would take over Monsanto and become the world's largest pesticide and seeds company. It is one of three major deals in the agrochemical sector the commission has investigated since December 2015, which together have led to a tight global oligopoly in the sector.

Commissioner Margrethe Vestager said: *"Seeds and pesticide products are essential for farmers and ultimately consumers. We need to ensure effective competition so that farmers can have access to innovative products, better quality and also purchase products at competitive prices. And at the same time maintain an environment where companies can innovate and invest in improved products."*

The Commission stated that it had preliminary concerns about the deal's effects on pesticides, seeds, and plant trait markets in which both companies wield considerable power and the deal could shut out would-be rivals.

DG Comp recently cleared two other deals in the agrichemicals sector, approving ChemChina's acquisition of Syngenta and Dow Chemical's takeover of DuPont's pesticide business. Both deals involved significant divestiture commitments. The commission forced Chemchina to sell parts of its subsidiary company and told DuPont it had to sell part of its pesticides arm.

Bayer and Monsanto submitted proposed divestitures and conditions intended to address the commission's concerns on 31 July, however the Commission's competition concerns remained. Now, the Commission has time till 8 January to reach a decision.

**Sources:**

http://globalcompetitionreview.com/article/1146543/eu-commission-takes-bayer-monsanto-to-phase-ii

http://europa.eu/rapid/press-release_IP-17-2762_en.htm

- **OECD and World Bank's Report: "Competition can curb inequality in developing countries"**

According to recent report titled "*A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth*" by the Organisation for Economic Cooperation and Development (OECD) and the World Bank, competition policy could help lift people out of poverty and curb inequality in developing countries.

The report is among a few where OECD has linked competition policy to income and wealth inequality in developing countries and outlies how competition can help the poorest groups in emerging and developing countries by improving household welfare, fostering innovation, and addressing market dominance.

Sean Ennis, OECD economist and co-author of the report's chapter on market power and distributional inequality, said that the link between competition and inequality had received little attention this is in part because "*competition authorities had tried to keep competition questions and distribution questions separate*".

The report makes two key observations: It suggests that competition can help drive economic growth, which in turn alleviates poverty, and that lower income groups are disproportionately affected by uncompetitive markets - particularly in the food, telecoms, transport, energy, and pharmaceutical industries. The Report suggests that market power often accounts for a "substantial amount" of wealth inequality.

**Sources:**

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- **The Federal Cartel Office (Bundeskartellamt) of Germany fined Volkwagen's automobile heat shields suppliers 9.6 million Euros in cartel settlement.**

German Competition Authority, Bundeskartellamt, has fined automobile heat shields suppliers 9.6 million Euros for colluding to pass on the prices

of a component part for automobile engine heat shields to car manufacturer Volkswagen.

Bundeskartellamt agreed settlements with Elring Klinger, Estamp and Lydall Gerhardi, which the enforcer had accused of exchanging sensitive information to strengthen their bargaining position with Volkswagen and agreed to pass on certain costs for aluminium sheets, a key component in heat shields in 2011. Leniency applicant Carcoustics received full immunity wheras other firms received reductions for cooperation with the Authority during the investigation.

Germany's settlement procedure requires companies to admit to their participation in infringements. On the other hand, claiming damages in settlement cases might not be easy, since settlement decisions tend to reveal fewer details that follow-on claimants might find helpful. Furthermore, Volkswagen has to consider that any legal position it takes here might be held against it in other cases – like in the Trucks cartel settlement, in which Volkswagen group is a defendant.

**Sources:**

http://globalcompetitionreview.com/article/1144568/germany-settles-automobile-heat-shields-cartel

http://auto.economictimes.indiatimes.com/news/industry/german-fines-3-volkswagen-suppliers-for-alleged-collusion/59590726

- **The Italian Competition Authority has fined 11 cement manufacturers, a cement distributor and a trade association more than €184 million for fixing prices and exchanging sensitive information.**

Italian Competition Authority concluded its investigation in cement industry it started in 2014 and found that the main cement companies (representing 85% of the Italian cement market) colluded on prices by issuing coordinated price lists, which were identical both in content and timing, and that they exchanged information to announce price increases and through cement trade association, AITEC for five years between 2011 and 2016.

Italian Competition Authority stated that the strategy included agreeing the time and amount of price list increases, communicating the future adoption of price list increases in advance and monitoring the prices. The enforcer concluded that AITEC helped the companies obtain up-to-date information

about volumes of cement delivered to each area of the country in order to monitor relevant market positions.

The authority reduced the fines on the companies by half, after taking into account the harm the 2007 financial crisis caused to the construction sector. Even though, the cement fine is one of the largest the Italian enforcer has imposed to date. The total of fines imposed by Italian Competition Authority in 2016 is 246 million Euros in total.

**Sources:**

http://globalcompetitionreview.com/article/1145394/italy-fines-cement-cartel-more-than-eur184-million

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- **The Decision of Ankara 7th Regional Administrative Court dated E. 2017/28 K. 2017/68:**

The application of recurrence provision in competition law is not dependent on the Misdemeanor Act.

The Appellate Court concluded that the fact that the Misdemeanor Act was not effective when the action basis to recurrence does not block the implementation of recurrence provisions on the basis of the Act no 4054. The relevant part of the decision is as follows:

*"...Accordingly, it is possible as per the Act no 4054 that administrative fines imposed by the Competition Authority might be based on recurrence and it is obvious that the main basis of this practice is the discretionary power granted by the Act no 4054. Although the expression "recurrence" was inserted into article 16 of the Act after the amendments in 2008, it was possible as per the previous version of the article to apply the repetition clause. Within this framework, the Competition Board based on the repetition clause in its practices before 2008."*

In this respect, the part of the Court decision canceling the part of the fines related to recurrence on the grounds that the first action basis to recurrence was committed in 2003 and the Misdemeanor Act was not effective at that date was not consistent with the law.

- **The Decision of 13th Chamber of the Council of State dated E. 2016/3930 K. 2017/1634:**

The lawsuit was brought by the Competition Board to abolish article 8/d of Union of Chambers of Turkish Engineers and Architects (UCTEA) Discipline Regulation; and articles 3.,4/d, 5., 8., 9., 10., 11., 12. and 14. of UCTEA Regulation on the Establishment of the Commission on Determining Minimum Charge and Drawing Standards and Control Bureaus, articles /8., 3/10., 6/1., 6/2., 6/3., 6/4-3. and 7/1 of UCTEA Regulation on Architecture and Engineering Services and Minimum Charge-Minimum Drawing and Arrangement Principles; articles 1., 2., 4/3., 4/6., 7., 8. and 10. Of UCTEA Regulation on Freelance Engineering and Architecture Services Minimum Charge.

The Council of State dismissed the lawsuit with respect to time period on the following grounds:

*"...It is understood from the file that UCTEA Discipline Regulation whose certain articles the plaintiff requested the annulment of was published on the Official Gazette dated 10.07.2002; UCTEA Regulation on the Establishment of the Commission on Determining Minimum Charge and Drawing Standards and Control Bureaus was published on the Official Gazette dated 24.07.1981; UCTEA Regulation on Architecture and Engineering Services and Minimum Charge-Minimum Drawing and Arrangement was published on the Official Gazette dated 23.02.2005; UCTEA Regulation on Freelance Engineering and Architecture Services Minimum Charge was published on 22.04.1990; the petition which did not include any transaction carried out according to the said Regulations was registered on 30.07.2007.*

*In this case, it is not possible to review the substance of the lawsuit, which was filed after the term of litigation expired according to the proclamation date, to annul the regulatory provisions of the Regulation due to lapse of time.*

*On the other hand, taking into account the facts that the Union, which is a superior Board of professional organizations having the nature of a public institution and legal personality, has power to issue regulations regarding its remit, in the lawsuit brought to annul the decision of the Competition Board dated 22.01.2002 and numbered 02.04-140-21 imposing fines on the Union because of implementing the regulations, in the file of 10th Chamber of the Council of State numbered E:2003/2705, considering the legal nature of Regulations, taking into account the facts that a decision of stay of execution was taken on 17.11.2003 because the conditions laid down in article 27 of the Act no 2577 was fulfilled, the objection to said decision was dismissed by the decision of the Council of State Administrative Law Chambers Board dated 11.03.2004 and numbered E:2004/93 and this decision was notified to the plaintiff on 26.05.2004, it is necessary to accept that the plaintiff learned that they could bring a lawsuit to annul the regulation provisions subject to the lawsuit upon the notification of that decision at the latest, accordingly a lawsuit was not brought against the said regulations within the term of litigation and it is clear that the term of litigation expired."*

- **The Decision of the Council of State Administrative Law Chambers Board dated E. 2014/4548:**

It was obvious that the Regulation on Fines was valid for the investigations which were initiated before that Regulation was put into effect but whose report was not notified. However, it was necessary that *lex mitior* principle should be evaluated in respect of the files whose report was notified.

In its decision, the Competition Authority, did not take into account the allegation that there were mitigating factors, because of the reason that the Regulation on Fines did not have application in the issue at hand. Administrative Law Chambers Board approved the judgment of the Chamber which annulled the Board decision, by evaluating the fact that lex mitior principle should have been considered, with the following reason:

*"...It was understood that the plaintiff claimed that the share of the activities which constituted the subject of the infringement was very low in annual gross income; however the Board imposed the plaintiff administrative fines at a rate of 1% on the grounds that it was not possible to apply the provisions of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position in the concrete case, without the possibility to resort to jurisdiction; as there were not any barriers in front of applying the provisions of the said Regulation, which could produce favorable results, to the decisions to be taken after the effective date, although it was necessary that the rate of administrative fines should be determined by considering the plaintiff's arguments and/or mitigating factors found ex officio and allowing judicial review, the Board decision imposed administrative fines to the plaintiff without taking into the aforementioned issues. The part of the Board decision in question related to the plaintiff was regarded inconsistent with the law..."*

- **The Decision of 13th Chamber of the Council of State dated E. 2016/1810 K. 2017/1575:**

Although professional organizations having the nature of a public institution that carry out transactions within the framework of the power granted by the relevant act are regarded as an undertaking, their activities cannot be examined under the scope of the Act no 4054.

The Competition Board rejected the application on the grounds that the activities of the association of undertakings concerned have a legal basis; therefore, it is not possible to carry out a transaction within the scope of the Act no 4054. The rejection of the Board was found consistent with the law. The Court put forward the following reasons in its decision:

*"According to article 3 of the Act no 4054 titled "Definitions", association of undertakings are defined as any kind of associations with or without a legal personality, which are formed by undertakings to accomplish particular goals and the article does not include any exceptions for*

*professional organizations having the nature of a public institution; therefore, it is obvious that Turkish Pharmacists Association should be regarded as an association of undertaking in respect of the implementation of the Act no 4054. In order for associations of undertakings to be subject to the Competition Act, whether they are legal persons according to private law or public law, or they are established voluntarily or depending on a law is not important.*

*On the other hand, it is accepted according to judicial decisions that associations of undertakings such as chambers or unions established by law are not subject to the Act no 4054 with regard to decisions and practices resulting from laws in their remits, in case the decisions in dispute are considered within the scope of the laws under the remits of the chamber or union, the consistency of those decisions with the law should be analyzed in nullity suits against those decisions; thus, in those cases the defendant administration does not have the power to carry out examinations or take decisions according to the Act no 4054. (The decisions of the Administrative Law Chambers Board dated 1.3.2004, Stay of Execution objection No:2004/93, dated 11.2.2010, E:2008/188 and dated 27.03.2008, Stay of Execution objection No:2007/774)*

*In this respect, the transaction in issue about the rejection of the complaint is not inconsistent with the law, and the decision of the Administrative Court regarding the cancellation of the subject matter of the lawsuit is not legally correct because the Protocol, which is the subject of competition infringements, was not annulled by a court decision; on the contrary, it was concluded with the decision dated 09.12.2015 and numbered E.2013/5975, K.2015/8656 of 15th Chamber of the Council of the State in the lawsuit to annul the Protocol that the lawsuit shall be dismissed on the grounds that the Protocol complied with the provisions of the Act no 6643; therefore in this case, according to the settled case law of*

*both Council of State Administrative Law Chambers and our Chamber, it is understood that the defendant administration does not have power to make examinations and take decisions as per the Act no 4054."*

## ○ Can One (Ever) Accurately Define Markets?

Published By: Journal of Competition Law & Economics

Author: Andrew P. Vassallo

The ongoing debate about the role of the definition of the relevant market in antitrust cases focuses on the usefulness and correct application of the Hypothetical Monopolist Test (HMT). In this regard, the author examines the accuracy of HMT within the framework of two different models in his article. In both models used, the true extent of the product market is known. First, the author applies the HMT in a linear differentiated demand model with (n) firms that each produce one symmetrically differentiated product, and derive conditions where (m) products would comprise a product market. According to the findings, the application of HMT within the framework of this model consistently results in underestimating the number of products in the relevant market.

The second model uses a quasi-linear utility specification, where the products enter the utility function independently and thus the only substitution between the two products occurs through the income effects of the budget constraint of consumers. Under certain conditions, there must be at least one producer of the other product in the smallest possible product market as defined by the HMT. Therefore, depending on the underlying parameters of the utility function, the HMT might produce purely arbitrary results by overestimating or underestimating the size of the relevant product market.

**Source:**

https://doi.org/10.1093/joclec/nhx012

## Industrial Policy to Develop a Multi-Firm Industry

Published By: Journal of Industry, Competition and Trade

Authors: Tigran Melkonyan, Dwayne Banks and Jeanne Wendel

Governments may face pressure to intervene to the market when coordination and learning externalities block development of otherwise-profitable industries that would produce merit goods for the domestic market. A short-term subsidy that offsets these externalities could help the development of a multi-firm industry, if a pioneer firm enters the market thanks to this subsidy and then the pioneer's first-period output generates coordination and learning externalities. These externalities could produce the necessary environment for the entry by input suppliers and/or competitors. However, empirical evidence raises questions about the use of short-term subsidies to accelerate the development of new industries. The study explores the issue that the subsidy may drive the pioneer firm to act with incentives to prevent the entry of new firms as a reason for the difficulty for developing new industries.

The study models the jump-start strategy for a multi-firm industry and examines whether applying a short-term fixed subsidy together with a per-unit subsidy can achieve the objective of creating a multi-firm industry. The results of the study shows that this strategy should be examined cautiously. A one-time fixed subsidy that facilitates a pioneer firm to enter the market will not generally enable the development of a multi-firm industry. Moreover, supporting the period-one fixed subsidy with a period-one per-unit subsidy can induce entry by the pioneer firm and a second firm, if the two firms will produce complementary goods.

**Source:**

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